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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1987

JACK TICKLE and RAY MONTEITH,

PETITIONERS

vs.

SHELBY COUNTY, et al,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

(1) Whether denial of a refund to developers of a portion of the investment required to install public facilities is repugnant to the Constitution, treaties, or laws of the United States in that it constitutes denial of the developer's Fourteeth Amendment rights to due process of law and equal protection.

B. PARTIES TO THE PROCEEDINGS

The Petitioners in the case before this Court are Jack Tickle and Ray Monteith.

The Respondents are Shelby County, Board of County Commissioners, County Mayor William Morris, Shelby County Board of Public Utilities, and Wilbur M. Betty, Superintendent of Shelby County Board of Public Utilities.

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D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS BELOW

The Opinions of the Supreme Court of Tennessee and the Court of Appeals of Tennessee for the Western District at Jackson are not published but are reprinted as Appendices A, B. and C to this Petition.

E. JURISDICTIONAL STATEMENT

i. The Opinion of the Supreme Court of Tennessee at Jackson was entered on November 23, 1987.

ii. It was filed on November 23, 1987. No Petition for Rehearing was filed. No extension of time has been granted within which to petition for certiorari.

iii. The Petitioners do not anticipate a cross-petition for Writ of Certiorari.

iv. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

F. REVELANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Petitioners rely on the Fourteenth Amendment to the Constitution of the United States, Section 1, reprinted as Appendix D, separately presented.

Petitioners also rely on Tennessee Code Annotated §§5-16-110 and 5-16-111, reprinted as Appendices E and F, separately presented.

G. STATEMENT OF THE CASE

On April 17, 1984, plaintiffs, Jack Tickle and Ray Monteith, filed a Complaint in Circuit Court against Shelby County, the Board of County Commissioners of Shelby County, County Mayor William Morris, the Shelby County Board of Public Utilities, and Wilbur M. Betty, Superintendent of the Shelby County Board of Public Utilities. The plaintiffs sought the refund of cash deposits paid to the County for the installation of water facilities in a subdivision developed by the plaintiffs.

On May 10, 1984, the defendants filed an Answer and Third-Party Complaint against the City of Millington. The defendants denied liability; in the alternative, the defendants argued that the City of Millington was liable.

The City of Millington filed a Motion

for Summary Judgment on June 14, 1984.

The original defendants filed a Motion for Summary Judgment on February 14, 1985. The Motion relied on the following three (3) arguments: (1) the Third-Party Complaint (sic) failed to state a cause of action against the original defendants; (2) there were no genuine issues of material fact, and the defendants were entitled to judgment as a matter of law; and (3) the Complaint amounted to an attempt to persuade the Court to set up and enforce an illegal contract.

Counsel for the original plaintiffs, the defendants and third-party defendants argued the two (2) motions before Judge Robert Lanier on March 22, 1985.

On April 4, 1985, Judge Lanier handed down an Order on Summary Judgment Motions. The Court rejected the argument that the County breached its original refund agreement with the plaintiffs. The Court based

this holding on the assumption that further steps were necessary to finalize a contract between the County and the plaintiffs. Although the Court acknowledged a tendency among the appellate cases to recognize the doctrine of "detrimental reliance" or "promissory estoppel", the Court refused to apply the doctrine to the instant case. The Court granted both Motions for Summary Judgment and dismissed the plaintiffs' action.

Counsel for the plaintiffs and defendants timely filed Notices of Appeal on both Motions.

After briefing and oral argument, the Court of Appeals handed down its Judgment on December 17, 1985. The Court reversed the trial court's action in dismissing the original complaint. The Court affirmed the trial court's action in dismissing the third-party complaint. The Court remanded the original complaint for trial on the

merits. A copy of the Court of Appeals' Judgment dated December 17, 1985 is included as Appendix B to the Petition for Writ of Certiorari, separately presented.

On remand, the trial court heard the case against the County defendants on October 27, 1986. On October 29, 1986, Judge Lanier handed down his decision, awarding the plaintiffs the sum of $104,208.99 along with prejudgment interest from April 11, 1984 in the amount of $25,180.00, for a total judgment of $129,388.99. Judge Lanier dismissed the action against Wilbur M. Betty. The defendants appealed the judgment against them.

After briefing and oral argument, the Court of Appeals handed down its Opinion on September 4, 1987. The appellate court reversed the trial court's verdict in favor of the plaintiffs. The Court of Appeals addressed one issue; that is, whether a

preponderance of the evidence supported the trial court's decision. The Court of Appeals concluded that the decision of the trial court was contrary to the preponderance of the evidence. A copy of the Court of Appeals Judgment, dated September 4, 1987. is included as Appendix C to this Petition.

The plaintiffs timely filed an application for permission to appeal in the Supreme Court of Tennessee. The Supreme Court denied this application on November 23, 1987. A copy of this Opinion is included as Appendix A to this Petition.

In 1967 or thereabouts, the federal government offered matching funds to utilities which, in turn, would offer a refund to developers of a portion of the investment required to install public facilities such as water service. Because Memphis Light, Gas & Water Division could not lay

water lines far beyond Memphis' city limits, the Shelby County Board of Public Utilities was created pursuant to Title 5, Chapter 16 of the Tennessee Code Annotated.

In the early 1970's, Wallace Johnson began plans for developing Woodmere Subdivision, a residential subdivision to be located in northeast Shelby County near Millington, Tennessee. Later, plaintiffs Tickle and Monteith took over the development of Woodmere Subdivision. Tickle and Monteith planned to develop the subdivision in three (3) sections: first, Section A; second, Section C; third, Section B.

Prior to the development of Sections A and C, defendant, Shelby County, through the Board, agreed to install the water facilities in the subdivision. By letter dated February 24, 1978, R. E. Gallagher, then the Superintendent of Public Utilities, assured Plaintiff Tickle that the cost of providing

water facilities to the subdivsion would be subject to the County's usual refund agreement. A copy of a standard refund agreement was introduced into evidence as Trial Exhibit 1.

Plaintiffs Tickle and Monteith believed that they had an agreement and/or contract with the County under the terms of which the County would extend its usual refund agreement to the cost of providing water facilities. Not only Dr. Gallagher's representations but also the fact that defendants, during the period of time in question, without fail, entered into refund agreements with the developer of every subdivision confirmed the plaintiffs' belief that they had a contract with the County providing for the usual refund.

In reliance upon Dr. Gallagher's representation in his capacity as Board Superintendent, plaintiffs Tickle and

Monteith made plans for developing the subdivision, including execution of a standard subdivision bond, arranging financing and entering into various real estate sales contracts.

By letter dated August 21, 1978, Dr. Gallagher demanded a cash deposit of $59,737.00 for the construction of the water facilities in Section A of the subdivision. Dr. Gallagher's letter, however, conditioned acceptance of the bid for the construction contract on the waiver of any rights under the County's usual refund agreement.

Since Plaintiffs Tickle and Monteith had previously obtained the bond, arranged financing and executed real estate sales contracts, they subsequently paid the cash deposit to the County.

By letter dated August 14, 1980, Dr. Gallagher demanded a cash deposit in the amount of $44,471.99 before the Board would

executed a construction contract with the successful bidder for the installation of water facilities in Section C of the Woodmere Subdivision. According to the letter, the Board made a previous agreement with the City of Millington and, therefore, the water installation would not be subject to the County's usual refund policy. The letter did not set out the substance of the agreement. Plaintiffs Tickle and Monteith were not parties to the alleged agreement between the City of Millington and the County. Plaintiffs Tickle and Monteith paid the cash deposit because they were already committed to begin development of Section C.

By letter dated April 23, 1981, Dr. Gallagher demanded a cash deposit in the amount of $71,932.30 for the installation of water in Section B of the Woodmere Subdivision. The plaintiffs declined to install water facilities in Section B in 1981.

By letter dated May 9, 1983, Wilbur M. Betty, the current Superintendent of the Shelby County Board of Public Utilities, demanded the sum of $59,746.50 before the Board would execute a contract for the installation of water facilities in Section B. According to the May 9th letter, the amount was not refundable; however, in a letter dated May 31, 1983, Mr. Betty indicated that upon completion of the installation of the water facilities in Section B of the Woodmere Subdivision, the Board would prepare a residential refund agreement. In a letter dated October 24, 1983, Mr. Betty enclosed Refund Agreement #182 for Section B of the Woodmere Subdivision.

Before filing the instant suit, the plaintiffs made numerous requests to the Board of Public Utilities, Mr. Betty, the Board of County Commissioners, individual commission members, and the County Attor-

ney's Office. At various times, various individuals made representations to the plaintiffs about the proper way to go about obtaining the refunds due. Despite these representations, the County ultimately refused to refund the cash deposits made by the plaintiffs on Sections A and C of Woodmere Subdivision. A letter dated January 1, 1984, written by Britton Lamb, Assistant County Attorney, verified the refusal.

The initial pleadings referred to the Federal law under which the Board offered refunds to encourage people to install public utilities. The defendants acknowledged the refund policy in their initial Answer, and admitted that it applied without fail to all developers with the exception of the plaintiffs. Thereafter, the trial court dismissed the original Complaint. When the Court of Appeals initially reversed the trial court's dismissal, it did not address this issue.

At trial, the parties did not contest this issue. The trial court entered a judgment in favor of the Petitioners. On the second appeal brought by the defendants, the defendants raised up three issues:

(1) That there was no evidence to support the judgment of the trial court;

(2) That the method of computation of the judgment was at variance with the method given by the contract said to have been breached; and

(3) That the facts of the case did not warrant the award of pre-judgment interest.

Again, the defendants did not dispute the existence and availability of the refund policy.

On the second appeal, the Court of Appeals of Tennessee addressed one issue, that is, whether the decision of the trial court was supported by a preponderance of the evidence.

Throughout the litigation, the plaintiffs averred that they relied upon a representation made by a government official acting in his capacity as Superintendent of the Board of Public Utilities.

In addition, the Plaintiffs relied upon the County's customary refund policy which the Board, for reasons undisclosed to the plaintiffs, violated in this instance. The plaintiffs pointed out that the County and the City of Millington failed to comply with Tennessee Code Annotated §§5-16-110 and 5-16-111.

On the first appeal, the Court of Appeals of Tennessee tended to agree with the plaintiffs' argument that the original Complaint sufficiently alleged the existence of a refund policy, a representation to the plaintiff/developers of how that refund policy would be applied to the subdivision, and action upon the part of the

plaintiffs to develop the subdivision based upon the representation made by Dr. Gallgher.

The Court of Appeals held that the plaintiff/developers sufficiently alleged facts so as to state a cause of action entitling them to trial on the merits. In effect, on the first appeal, the Court of Appeals of Tennessee acknowledged that the defendants had denied the plaintiffs property without due process of law and had denied them equal protection of the laws.

Upon remand for trial on the merits, the plaintiffs established the allegations of the original Complaint. The Court of Appeals, then, in its second Opinion dated September 4, 1987, adopted a different stance contrary to its ruling dated December 17, 1985.

In their Application for Permission to Appeal to the Supreme Court, the plaintiffs noted the conflict between the Court of Appeals' two decisions.

ARGUMENT

For the following reasons, Petitioners respectfully request that the Supreme Court of the United States of America grant their Petition for Writ of Certiorari:

In its Opinion filed December 17, 1985, the Court of Appeals copied the allegations of the original Complaint in its entirety. (Opinion of the Court of Appeals, December 17, 1985, Appendix B, separately presented). According to the December, 1985 Opinion, the original Complaint alleged that the plaintiffs relied upon the representation of the Superintendent of the Shelby County Board of Public Utilities. Dr. Gallagher initially advised the plaintiffs that the Board's usual refund policy would be followed. The Complaint further averred: "[I]n addition to reliance upon a specific representation by Dr. Gallagher acting in his capacity as

Superintendent of the Board of Public Utilities, the plaintiffs relied upon the County's customary refund policy which the Board, for reasons undisclosed to the plaintiffs, violated in this instance."

The Court of Appeals held that a complaint should not be dismissed for failure to state a claim unless it appears to the trial court beyond a doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. (Sullivant v. Americana Homes, Inc., 605 S.W.2d 246 (Tenn. App. 1980), appeal denied (1980). In scrutinizing a complaint in the face of a Rule 12.02(b) motion, the Court of Appeals held that the complaint should be liberally construed in favor of the plaintiff taking all of the allegations contained therein as true. Id.

The Court of Appeals stated that a motion to dismiss for failure to state a claim

upon which relief could be granted is an admission that all relevant material averments contained in the complaint are true. Shelby County v. King, 620 S.W.2d 493 (Tenn. 1991) (citing Holloway v. Putnam County, 534 S.W.2d 292 (Tenn. 1976); Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975)); see also Fuerst v. Methodist Hospital South, 566 S.W.2d 847, 848 (Tenn. 1978) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

According to the Court of Appeals, the original Complaint sufficiently alleged the existence of a refund policy, a representation to the plaintiffs/developers of how that refund policy would be applied to the subdivision, and action on the part of the plaintiffs to develop the subdivision based upon the representation by Dr. Gallagher. The Court of Appeals held that the plaintiffs alleged sufficient facts so as to state a cause of action entitling them to a

trial on the merits.

Upon remand for trial on the merits, the plaintiffs established the allegations of the Complaint. The following legal theories supported the decision of the trial court.

At trial, the defendants admitted that the refund policy existed. The defendants admitted that Dr. Gallagher wrote the February 24, 1978 letter. The defendants admitted that the plaintiffs completed the subdivision. The defendants denied that the plaintiffs took this action based upon representations made by Dr. Gallagher.

Jack Tickle testified that he and his partner took the following actions based upon the representations contained in the February 24, 1978 letter: (1) entered into real estate sales contracts; (2) entered into a subdivision development bond; (3) obtained building permits; (4) arranged

financing; (5) requested that the Board prepare plans and specifications for the installation of water service and advertise for bids for the installation; (6) complied in all respects with the instructions set forth in the letter.

According to the Court of Appeals, the letter of February 24, 1978 did not constitute an offer which the plaintiffs accepted. In the Court of Appeals' estimation, the February letter provided only that if the plaintiffs found the cost estimate acceptable the Board of Public Utilities would prepare plans and specifications that would be used to advertise for competitive bids. The Court stated that there were no mutual obligations at that point and either party could have backed out of the arrangement without penalty. The Court determined that three binding contracts were later entered into between the plaintiffs and the Board of

Public Utilities, that is, one contract for each section of the Woodmere Subdivision. The offers were made, according to the Court of Appeals, when Dr. Gallagher communicated the amount of the low bid and requested a check from the plaintiffs. The plaintiffs then accepted the offer by tendering payment. (Court of Appeals' Opinion, September 4, 1987, Appendix C, separately presented.)

Petitioners respectfully insist that this interpretation by the Court of Appeals is contrary to Tennessee law, Federal law, and in violation of Constitutional principles.

In Tennessee, a binding contract may be entered into by letter. After such a contract is completed, subsequent letters cannot affect the previous contract unless they result in a new contract. Neilson & Kittle Canning Co. v. F. G. Lowe & Co., 149 Tenn.

561, 566, 260 S.W. 142 (1924).

In Levering & Carncross v. The Mayor, 26 Tenn. (7 Hum.) 553 (1847), the plaintiff by its authorized agent wrote to the Mayor and Aldermen of the City of Memphis. The letter contained a proposal to grade and gravel the City's streets. The City accepted the proposition in an answer signed by two of three committee members appointed to make a contract for grading and gravelling. The Mayor and Aldermen subsequently abrogated the contract. In the resulting lawsuit, the trial court instructed the jury that the proposition and its acceptance did not form a binding contract. Instead, the court charged, the proposition and acceptance constituted an agreement to enter into a contract and required something more to e done by the parties. The Tennessee Supreme Court reversed holding, "[a] proposition by one party and an acceptance by the other

constitute an agreement binding on both." Id. at 556.

In Cole-McIntyre-Norfleet Co. v. Holloway, 141 Tenn. 679, 214 S.W. 817 (1919), on March 26th, one of the appellant's salesmen solicited and received from the appellee an order for certain goods. After giving the order, the appellee heard nothing until May 26th when the salesman told the appellee that the March 26 order had not been accepted. Both the trial court and appellate courts held that the appellant had accepted the order by its silence. According to the Tennessee Supreme Court:

> It is a general principle of the law of contracts that, while an assent to an offer is requisite to the formation of an agreement, yet such assent is a condition of the mind, and may be either express or evidenced by circumstances from which assent may be inferred. Id. at 685.

In Lazarov v. Nunnally, 188 Tenn. 145, 217 S.W.2d 11 (1949), the complainant and

defendant entered into a written agreement evidenced by a letter. The letter, written by the defendant to the complainant, confirmed an agreement by the defendant to deliver a certain quantity of steel tubing at a certain price to the complainant, provided the complainant sold the tubing in advance of delivery and within sixty days of the letter. The complainant sold the tubing in advance within sixty days; however, the complainant could not make delivery because the defendant had sold all of the tubing. The trial court overruled the defendant's demurrer to a breach of contract action brought by the complainant. The Tennessee Supreme Court upheld the Chancellor's action. The Court noted:

> Where the offeree or broker manifests his assent to the offer by entering upon performance and spending time and money in his efforts to perform, then the offer becomes irrevocable during the time stated and binding upon the prin-

> cipal according to its terms . . . Id. at 14 (citing, Hutchinson v. Dobson-Bainbridge Realty Co., Inc., 31 Tenn. App. 490, 217 S.W.2d 6, 10 (1946)).

In Allen v. Elliott Reynolds Motor Co., 33 Tenn. App. 179, 230 S.W.2d 418 (1950), one of the defendants, a wholesale distributor of automobiles, entered into negotiations with the plaintiff to give him a contract as the exclusive Hudson dealer in his county. The defendants required that the plaintiff would have to provide a suitable building and suitable equipment among other things. One of the defendants wrote a letter to the plaintiff confirming the negotiations. According to the letter, the plaintiff had sixty days to comply with all requirements listed. The plaintiff began to comply; however, the defendant repudiated the contract upon instructions by the Hudson Motor Car Company to stop signing up new dealers.

The plaintiff filed suit. The Court rejected the defendants' argument that the letter or memorandum of the agreement was too indefinite to be enforced. The trial court held, and the Court of Appeals agreed, that the negotiations resulted in a valid contract between the parties. Id. at 421-22.

Once an offer is accepted, one party cannot unilaterally vary the terms of the resulting contract, nor can one party alone end the contract. Akers v. Sedberry, 39 Tenn. App. 633, 286 S.W.2d 617, 620-21 (1955).

For example, in Springfield Tobacco Redryers Corp. v. City of Springfield, 41 Tenn. App. 254, 293 S.W.2d 189 (1956), the owner of realty sued the City to recover damages for alleged breach of contract to purchase realty pursuant to the Industrial Revenue Bond Act of 1951. The Court of

Appeals held in favor of the owner. According to the Court, the contract contained two conditions: (1) that bonds were voted; and (2) that the city could enter into a lease contract with a manufacturer for he realty at a rental sufficient to pay the bonds. Such conditions were met; however, the manufacturer became dissatisfied with the lease and changed its mind. The Court, nevertheless, held the city bound to the obligation to the owner of the realty.

In the case before this Court, Dr. Gallagher's letter of February 24, 1978, provided as follows:

> Based on current unit prices being offered this Board, the estimated cost of the water facilities to Woodmere Subdivision, First Section, is $45,870.00. Of this amount approximately $39,980.00 will be subject to our usual refund agreement, a copy of which is enclosed for your information. The cost of fire protection, $5,890.00, is non-fundable.
>
> The estimated cost of the com-

plete Woodmere Subdivision is $155,457.00, which includes the amount given above for Section 1. Of this amount $132,225.00 is refundable, approximately, subject to our refund agreement. The cost of fire protection, $23,232.00, is non-refundable.

Should this estimate be acceptable to you, plans and specifications will be prepared and used to advertise for competitive bids for this installation. The successful bid price, plus 10%, will be the cash deposit required before installation could begin. In addition, curbs and gutters, sewers and drainage pipes must be installed and streets rough graded. It will also be required that a "W" be painted on the vertical face of the curb at the desired location on each lot where the water meter box should be located. Care should be taken so that this location is a minimum of four feet from the sewer ditch and will not be in a proposed driveway. In addition, lot lines must be marked for fire hydrant installations.

If you have any questions, please contact this office.

In the Court of Appeals' estimation, the letter of February 24, 1978 did not constitute an offer which the plaintiffs accepted. The Court of Appeals failed to

consider certain allegations made in the Complaint and proved at trial. The February 24, 1978 letter, which was attached as Exhibit 1 to the Complaint and incorporated therein as if set forth verbatim, contained no conditions to be fulfilled by the plaintiffs. The letter simply stated: "Should this estimate be acceptable to you, plans and specifications will be prepared and used to advertise for competitive bids for the installation."

Between February 24, 1978 and August 21, 1978, the date of the letter purportedly advising plaintiff Tickle of the change in refund policy, plans and specifications were prepared and used to advertise for competitive bids.

According to proof offered at trial, the plaintiffs did not understand that fur- ther contractual documents had to be signed before the refund agreement was operative. The

February 24, 1978 letter does not state that further documents had to be signed. The residential refund agreement form used by the County did not have to be signed by the plaintiffs but, rather, was to be signed by the Superintendent of the Board of Public Utilities after completion of the installation of water facilities. In reliance upon Dr. Gallagher's letter, the plaintiffs went ahead with plans for developing the subdivision based on the assumption that the County would refund certain monies. Even after the defendants attempted to unilaterally abrogate the refund agreement, the plaintiffs continued to pursue the refunds due by making numerous inquiries to the Board of Public Utilities, Wilbur Betty, the Board of County Commissioners and the County Attorney's Office. Moreover, the plaintiffs relied upon the County's customary refund policy. The defendants' Answer and Third-

Party Complaint admitted that the defendants, without fail, entered into refund agreements with subdivision developers, with the exception of Woodmere Subdivision.

In Pennyrile Tours, Inc. v. County Inns, USA, Inc., 559 F.Supp. 15 (E.D. Tenn. 1982), the plaintiff Pennyrile orally contracted for group room reservations with the defendant and was required to pay deposits in advance. The defendant represented that its facilities would be completed prior to the opening of the Worlds Fair. The facilities were not completed on time and the plaintiff cancelled its reservations. The defendant, however, refused to refund the deposits. The Court entered judgment for the plaintiff because the practice of refunding deposits was a regular method of dealing in the tourist trade upon cancellation thirty days prior to the scheduled arrival date. Exceptions to this practice

were customarily made known during negotiations. The Court awarded a full refund to the plaintiff because the plaintiff relied upon the defendant's silence and customary practice. Id. at 15-17.

The proof offered at trial confirmed that the plaintiffs paid the deposits on Sections A and C because they were committed to third-parties to begin development of these sections. The plaintiffs did not make the payments with full knowledge that the monies would not be refundable. On the contrary, by letters dated April 21, 1981 and May 9, 1983, Dr. Gallagher and Wilbur Betty both indicated that the deposits on Section B would be non-refundable; however, by letter dated May 31, 1983, Mr. Betty reversed his previous stance, indicating that the amount would be refundable.

The February 24, 1978 letter consti-

tuted, at the least, a memorandum confirming a contract embodied in the terms of the refund agreement between the plaintiffs and the County. Denial of the refund constituted a taking of the Petitioners' property without due process of law and a denial of equal protection under the law.

The Court of Appeals held in the September 4, 1987 Opinion that the plaintiffs were initially informed that a refund for Sections A and C of Woodmere Subdivision would be forthcoming. Contracts subsequently entered into were conditioned expressly upon the plaintiffs' waiver of th right to any refund. The Court determined that, after a voluntary waiver, the plaintiffs could no longer rely upon the previous representation to the contrary; therefore, there was nothing upon which to base the estoppel.

Tennessee law does not support this interpretation; therefore, the denial of the

refund violated the Fourteenth Amendment to the United States Constitution.

Under Tennessee law, the doctrine of estoppel has been applied against counties and subdivisions of counties. Greene County v. Tennessee E. Elec. Co., 40 F.2d 184, 186 (6th Cir. 1930). For example, in Owen of Georgia, Inc. v. Shelby County, 648 F.2d 1084 (6th Cir. 1981), the lowest bidder was authorized to recover damages on the basis of promissory estoppel because it justifiably relied on the county's promise when the county awarded a public contract to the second lowest bidder in violation of the Shelby County Restructure Act. (Cited with approval in Browning-Ferris Industries of Tennessee, Inc. v. City of Oak Ridge, 644 S.W.2d 402 (Tenn. App. 1982), although not expressly on the basis of estoppel theories.)

The Tennessee Supreme Court has defined

equitable estoppel in the following terms:

> "Equitable estoppel or estoppel in pais is a principle by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon them thereby, as a consequence reasonably to be anticipated, charging (sic) his position in such a way that he would suffer injury if such denial or contrary assertion were allowed."

Lawrence County v. White, 200 Tenn. 1, 288 S.W.2d 735, 738 (1956) (citing 19 Am.Jur., Sec. 34, p. 634).

In the case before this Court, the defendants' usual and customary policy was to allow refunds because of the matching funds agreement with the Federal government. In view of Dr. Gallagher's representations and the customary practice, the defendants undoubtedly intended for the

plaintiffs to rely upon the February, 1978 letter or acted in a manner justifying the plaintiffs' right to believe that the conduct could be relied upon. For reasons undisclosed to plaintiffs, the Board refused to adhere to its usual refund policy. The plaintiffs, in reliance upon the letter and usual policy, proceeded with plans for the subdivision.

Defendants failed to disclose and arguably concealed behind scenes negotiations with the City of Millington from the Plaintiffs.

The February 24, 1978 letter constituted a representation as to an existing fact, refundability or a representation which amounted to an engagement.

> "The estimated cost of the complete Woodmere Subdivision is $155,457.00, which includes the amount given above for Section 1. Of this amount, $132,225.00 is refundable, approximately, subject to our refund agreement." (Emphasis

added).

Subsequent denial of the refund violated Federal law and Constitutional principles.

Title 5, Chapter 16 of the Tennessee Code Annotated provides guidelines for the establishment and regulation of urban type public facilities such as the Shelby County Board of Public Utilities.

Section 5-16-111 provided:

> **5-16-111. Limitation on service near city or town - Effect of failure of municipality to provide facilities.** - A county may not extend any public facilities, as provided for in this chapter, within five (5) miles of any part of the boundary of an incorporated city or town unless such incorporated city or town has failed to take appropriate action to provide a specified public facility or facilities in a specified area or areas for a period of ninety (90) days after having been petitioned to do so by resolution of the county legislative body or other governing body, which resolution shall contain a plan of service, and shall be accompanied by a preliminary engineering report and a financial feasibility report, and shall set out the type, standard and schedule of installation of public facilities and the specified area

or areas proposed to be served by the county, and which resolution, plan of service and reports shall have been previously submitted to the local planning commission for review as provided for in §5-16-112.

Upon annexation of facilities by a municipality, T.C.A. §5-16-110 outlined the appropriate procedure, including arbitration of matters in dispute:

> **5-16-110. Annexation of facilities by municipality - Arbitration - Rights of bondholders.** - (a) Upon annexation by any municipality of an area including any of the facilities herein authorized and provided for, the municipality and the county legislative body or other governing body shall attempt to reach agreement in writing for the allocation and conveyance to the municipality of any or all functions, rights, duties, property, assets or liabilties in conjunction with such facilities that justice and reason may require in the circumstances. The annexing municipality, for and to the extent that it may choose, shall have the exclusive right to provide such facilities within the annexed area. Subject to such exclusive right, any such matters upon which the respective parties are not in agreement in writing within sixty (60) days after the operative date of such annexation shall be settled by arbitration in

> accordance with the laws of arbitration of the state of Tennessee effective at the time of submission to the arbitrators, and subdivision (2) of §23-501, shall not apply to any arbitration arising hereunder. The award so rendered shall be transmitted to the chancery court, and thereupon shall be subject to review in accordance with §§23-513 through 23-514 and 23-518.
>
> (b) If there are outstanding bonds or other obligations in conjunction with the public facilities herein provided for, the agreement or arbitration award shall also provide that the municipality will operate such facilities in the annexed territory and account for the revenues therefrom in such manner as not to impair the obligations of contract with reference to such bonds or other obligations. The rights vested in the holders of all such outstanding bonds or other obligations shall be fully preserved and in no wise impaired by any agreement or arbitration award.

T.C.A. §5-16-111 in no way prohibited the contract between the County and plaintiffs Tickle and Monteith which provided for the usual and customary refund. Moreover, T.C.A. §5-6-110 expressly recognized and protected the outstanding rights, duties,

liabilities, and obligations involved in annexation of County public facilities.

In Pitts & Company, Inc. v. City of Memphis, 558 S.W.2d 448 (Tenn. App. 1977), for example, subdivision developers sued the City to enforce terms of an aid-in-construction contract entered into with a water utility district and won. Although a different code section applied to the Pitts case, this ruling is instructive in the case before this Court.

The Answer and Exhibits filed by the defendants demonstrated that the County did not proceed in accordance with sections 5-16-111 and 5-16-110.

In the August 29, 1978 Minutes of the Board of Public Utilities, the Board considered a contract between itself and the City of Millington. The Minutes merely reflect that upon annexation of the First Section (Section A) of Woodmere annexation,

the Board would sell the facilities to Millington for the amount invested.

The Minutes of the April 28, 1981 meeting of the Board concerned installation of water facilities in Section B of the Subdivision. The Minutes stated: "This project will be funded the developer, Monteith and Tickle, on a non-refundable basis." However, installation of Section B was later made on a refundable basis.

Exhibits H through K to the Answer and Third-Party Complaint included correspondence between the Board, the City of Millington, and Memphis Light, Gas & Water on the subject of installation of public utilities in Woodmere. Only the November 14, 1978 letter from Millington Mayor Tom Hall to Dr. Gallagher indicated a carbon copy to plaintiff Monteith. This letter merely gave the County permission to furnish water to Woodmere but did not specify terms.

In the case before this Court, the County initially promised the plaintiffs/ developers a refund in consideration for their development of Woodmere Subdivision. The County later, for reasons undisclosed to the plaintiffs, reneged upon this promise. Not only does the Court of Appeals' Decision dated September 4, 1987 conflict with its decision dated December 17, 1985, but the later decision also sets forth a different standard for evaluating contracts between private parties and governmental entities as opposed to contracts between private parties. Although at common law governmental entities have been given special consideration against tort actions under the doctrine of soverign immunity, no such special consideration has been extended to governmental entities in the area of contract actions. Those individuals, such as the plaintiffs, who contract with governmental

entities need to know that their contracts with such entities will be fulfilled according to the terms of the contract and applicable law.

Because the defendants denied the plaintiffs the refund to which they were entitled the defendants violated the plaintiffs' Constitutional rights to due process and equal protection.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari and allow the filing of Briefs in this Court.

RESPECTFULLY SUBMITTED this 23 day of February, 1988.

JAMES D. CAUSEY
Counsel of Record
Attorney for Petitioners
208 Adams Avenue
Memphis, Tennessee 38103
(901) 526-0206

CERTIFICATE OF SERVICE

I, James D. Causey, Counsel of Record for Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 22 day of February, 1988, I served three copies of the Petition for Writ of Certiorari on each of the several parties thereto, as follows:

On Mr. Britton Lamb, Assistant County Attorney, by mailing three copies in a duly addressed envelope, with first-class postage prepaid to: Suite 801 - 160 North Mid-America Mall, Memphis, Tennessee 38103.

It is further certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

James D. Causey

NO. 87 1418

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1987

JACK TICKLE and RAY MONTEITH,

PETITIONERS

vs.

SHELBY COUNTY, et al,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JAMES D. CAUSEY, Counsel of Record
208 Adams Avenue
Memphis, Tennessee 38103
(901) 526-0206

Attorney for Petitioners

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IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

JACK TICKLE and RAY MONTEITH, Plaintiffs/ Appellees vs. SHELBY COUNTY; BOARD OF COUNTY COMMISSIONERS; COUNTY MAYOR WILLIAM MORRIS; SHELBY COUNTY BOARD OF PUBLIC UTILITIES; and WILBUR M. BETTY, Superintendent of Shelby County Board of Public Utilities, Defendants/ Appellants	)	SHELBY LAW NO. 38 (No. 07356 T.D. Below) Filed: November 23, 1987

O R D E R

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied.

PER CURIAM

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION OF JACKSON

JACK TICKLE and RAY MONTEITH, Plaintiffs/ Appellants vs. SHELBY COUNTY; BOARD OF COUNTY COMMISSIONERS OF SHELBY COUNTY; COUNTY MAYOR WILLIAM MORRIS; SHELBY COUNTY BOARD OF PUBLIC UTILITIES; and WILBUR M. BETTY, Superintendent of the Shelby County Board of Public Utilities, Defendants/ Appellees/ Appellants vs. THE CITY OF MILLINGTON, TENNESSEE, Third-Party Defendant/ Appellee	)	Shelby Law HON. ROBERT A. LANIER Judge Filed December 17, 1985

JAMES D. CAUSEY and ALICE L. GALLAHER, of Memphis, Attorneys for Plaintiffs/Appellants JACK TICKLE and RAY MONTEITH.

BRIAN L. KUHN, SHELBY COUNTY ATTORNEY, and BRITTON LAMB, ASSISTANT COUNTY ATTOR-

NEY, of Memphis, Attorneys for Original Defendants/Appellants and Defendants/ Appellees.

JAMES W. WATSON, of WATSON, ARNOULT & QUINN, Memphis, Attorney for Third-Party Defendant/ Appellee, CITY OF MILLINGTON, TENNESSEE.

REVERSED IN PART: AFFIRMED IN PART: REMANDED.

OPINION FILED: December 17, 1985

TOMLIN, J.

This case arose out of an alleged contract between plaintiffs and the Shelby County Board of Public Utilities regarding installation of water lines in a subdivision being developed by plaintiffs. The original defendants filed an answer and also a third-party complaint against the City of Millington for indemnification in the event of an adverse judgment against them.

The original defendants and the third-party defendant filed what they have styled "motions for summary judgment." Each motion contained the allegation that the complaint

or the third-party complaint, as the case may be, failed to state a claim upon which relief could be granted. The trial court granted both motions, holding that neither the original complaint nor the third-party complaint stated a cause of action. The sole issue presented by this appeal is whether the trial court was in error in granting the motions.

While labeled "summary judgment motions," no affidavits were filed. Nor does the record reflect that the court considered anything outside the pleadings. Accordingly, we treat these motions as having been filed and considered under Rule 12.02(6) Tenn. R. Civ. P. Thus, the complaint and the third-party complaint stand on their own. We deem it appropriate to copy them here.

The original complaint, in its entirety, stated:

> Come now the Plaintiffs and would respectfully show unto the Court as follows:
>
> 1. Plaintiff, Jack Tickle,

is a resident citizen of Shelby County, Tennessee.

2. Plaintiff, Ray Monteith, is a resident citizen of Shelby County, Tennessee.

3. Defendant, Shelby County, is a political subdivision of the State of Tennessee.

4. Defendant, Board of County Commissioners of Shelby County, is the governing legislative body of Shelby County.

5. Defendant, County Mayor William Morris, is the Chief Executive Officer of Shelby County, Tennessee.

6. Defendant, Shelby County Board of Public Utilities (hereinafter referred to as the "Board"), is an administrative agency of Shelby County.

7. Defendant, Wilbur M. Betty, is the Superintendent of the Shelby County Board of Public Utilities.

8. In the early 1970's, Wallace Johnson began plans for developing the Woodmere Subdivision, a residential subdivision to be located in northeast Shelby County near Millington, Tennessee.

9. Later, Plaintiffs Tickle and Monteith, took over the development of Woodmere Subdivision.

10. Plaintiffs, Tickle and Monteith, made plans to develop the subdivision in three (3) sections; first,

Section A; second, Section C; third, Section B. Plaintiffs are currently in the process of developing Section B and have developed Sections A and C.

11. Prior to the development of Sections A and C, Defendant, Shelby County, through the Board, agreed to install the water facilities in the Subdivision.

12. By letter dated February 24, 1978, R. E. Gallagher, then the Superintendent of Public Utilities, assured Plaintiff Tickle that the cost of providing water facilities to the Subdivision would be subject to the County's usual refund agreement. The letter is attached hereto as Exhibit "1" and incorporated herein as if set forth verbatim.

13. In reliance upon Dr. Gallagher's representation in his capacity as Board Superintendent, Plaintiffs Tickle and Monteith made plans for developing the Subdivision, including arranging financing and entering into various real estate sale contracts.

14. By letter dated August 21, 1978, Dr. Gallagher demanded a cash deposit of $59,737.00 for the construction of the water facilities in Section A of the Subdivision. A copy of this letter is attached hereto as Exhibit "2" and incorporated herein as if set forth verbatim.

15. Dr. Gallagher's letter conditioned acceptance of the bid for the construction contract on the waiver of any rights under the County's usual

refund agreement.

16. Since Plaintiffs Tickle and Monteith had previously arranged financing and executed real estate sales contracts, they paid the cash deposit to the County.

17. Tapp Enterprises, Inc. submitted the successful bid to construct the water facilities in Section A of the Woodmere Subdivision, and also Phase I of the Crenshaw Subdivision which is located in northeast Shelby County near Millington, Tennessee.

18. Upon completion of the water facilities in Phase I of the Crenshaw Subdivision, the County refunded the cash deposit required in advance; however, the County failed to refund the advance cash deposit made by the Plaintiffs to secure Section A of the Woodmere Subdivision.

19. By letter dated August 14, 1980, Dr. Gallagher demanded a cash deposit in the amount of $44,471.99 before the Board would execute a construction contract with the successful bidder for the installation of water facilities in Section C of the Woodmere Subdivision. A copy of this letter is attached hereto as Exhibit "3" and incorporated herein as if set forth verbatim.

20. According to the letter, the Board made a previous agreement with the City of Millington and, therefore, the water installation would not be subject to the County's usual refund policy.

21. Plaintiffs Tickle and Monteith paid the cash deposit because they were already committed to begin development of Section C.

22. By letter dated April 23, 1981, Dr. Gallagher demanded a cash deposit in the amount of $71,932.30 for the installation of water in Section B of the Woodmere Subdivision. According to the letter, which is attached hereto as Exhibit "4" and incorporated herein as if set forth verbatim, the amount was non-refundable.

23. Because of adverse economic conditions, the Plaintiffs declined to install water facilities in Section B in 1981.

24. By letter dated May 9, 1983, Wilbur M. Betty, the current Superintendent of the Shelby County Board of Public Utilities, demanded the sum of $59,746.50 before the Board would execute a contract for the installation of water facilities in Section B. A copy of the letter is attached hereto as Exhibit "5" and incorporated herein as if set forth verbatim.

25. According to the May 9th letter, the amount was not refundable; however, in a letter dated May 31, 1983, Mr. Betty indicated that upon completion of the installation of the water facilities in Section B of the Woodmere Subdivision, the Board would prepare a residential refund agreement. A copy of this letter is attached hereto as Exhibit "6" and incorporated herein as if set forth

verbatim.

26. In a letter dated October 24, 1983, Mr. Betty enclosed a Refund Agreement #182 for Section B of the Woodmere Subdivision. A copy of the letter is attached hereto as Exhibit "7" and a copy of the Refund Agreement is attached hereto as Exhibit "8". Both are incorporated herein as if set forth verbatim.

27. Despite numerous inquiries to the Board of Public Utilities, Mr. Betty, the Board of County Commissioners, individual Commission members, and the County Attorney's Office, by Plaintiffs Tickle and Monteith, the County has refused to refund the cash deposits made by the Plaintiffs on Sections A and C of Woodmere Subdivision. A letter dated January 1, 1984, written by Britton Lamb, Assistant County Attorney, verifies the refusal. A copy of the letter is attached hereto as Exhibit "9" and incorporated herein as if set forth verbatim.

28. The County, acting through the Board, has refused to refund the monies even though Dr. Gallagher initially stated in 1978 that the Board's usual refund policy would apply to Sections A, B and C of the Subdivision, and the Plaintiffs relied on this representation in developing the Subdivision.

29. In addition to reliance on a specific representation by Dr. Gallagher acting in his capacity as Super-

intendent of the Board of Public Utilities, the Plaintiffs relied on the County's customary refund policy which the Board, for reasons undisclosed to the Plaintiffs, violated in this instance.

30. The Defendants have arbitrarily refused to refund monies due these Plaintiffs which has previously been and continues to be their established policy in Shelby County except as it pertains to these Plaintiffs.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray:

(1) That process issue and be served upon the Defendants requiring them to appear and answer this Complaint, but not under oath, as their oath thereto is hereby expressly waived.

(2) That the Plaintiffs be awarded a refund of the cash deposit paid to the County for installation of water facilities to Sections A and C as well as costs and prejudgment interest.

(3) That the Defendants be ordered to comply with their Refund Agreement set forth in Paragraph 26 above.

(4) That the Plaintiffs reserve the right to amend these pleadings to conform to the proof and facts as they develop.

(5) That the Plaintiffs be awarded further, general or specific relief

to which they are entitled in the premises.

A portion of the Defendants' third-party complaint against the City of Millington reads as follows:

1.

They incorporate herein all of the statements and exhibits in their foregoing Answer.

2.

Third-party plaintiffs without fail enter into refund agreements with the developers of each and every subdivision, with the one exception mentioned in the complaint.

3.

The only reason they did not enter into such an agreement with plaintiffs was because Millington refused to allow original plaintiffs to have original defendants construct water lines and appurtenances in Woodmere Subdivision, Section "A" and "C" if such refund agreements were executed, because Millington didn't want to pay the agreements off when Millington annexed Woodmere, per T.C.A. 5-16-110(b).

4.

Wherefore defendants, as third-party plaintiffs, pray for judgment against the City of Millington for

all sums found due against defendants and in favor of plaintiffs.

It should be noted that the original complaint alleged that plaintiffs relied on the representation of the then Superintendent of the Shelby County Board of Public Utilities who initially advised them that the Board's usual refund policy would be followed, and that "[i]n addition to reliance on a specific representation by Dr. Gallagher acting in his capacity as Superintendent of the Board of Public Utilities, the Plaintiffs relied on the County's customary refund policy which the Board, for reasons undisclosed to the Plaintiffs, violated in this instance."

A complaint should not be dismissed for failure to state a claim, unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Sullivant v.

Americana Homes, Inc., 605 S.W.2d 246 (Tenn. App.), appeal denied, (1980). Likewise, in scrutinizing a complaint in the face of a Rule 12.02(b) motion, the court should construe the complaint liberally in favor of the plaintiff, taking all of the allegations of face therein as true. Id. Finally, a motion to dismiss for failure to state a claim upon which relief can be granted is an admission that all relevant and material averments contained in the complaint are true. Shelby County v. King, 620 S.W.2d 493 (Tenn. 1981).

In our opinion, the original complaint sufficiently charges the existence of a refund policy, a representation to the developer how that refund policy would be applied to its subdivision, and action on the part of the plaintiff to develop this subdivision based upon such representations by the Superintendent of the Shelby County Board of Public Utilities. We are in no way hold-

ing that plaintiffs may likely prevail upon their claims. We do hold that they have alleged sufficient facts so as to state a cause of action and are entitled to a trial on the merits. For this reason, we are of the opinion that the trial judge erred in granting the motion to dismiss the original complaint.

This Court's interpretation of the third-party complaint is that original defendants have sued the City of Millington to recoup any sums found due plaintiffs by original defendants. In the third-party complaint, original defendants/third-party plaintiffs alleged that they did not enter into refund agreements with plaintiffs in connection with their subdivision because the City of Millington would not honor these agreements when Millington annexed plaintiffs' subdivision. In its motion to dismiss, third-party defendant, City of Mill-

ington, asserted that it had not annexed any of the plaintiff's subdivision and that it would not annex any of it. In light of this, we agree with the trial court that the third-party complaint stated no claim upon which relief can be granted. Accordingly, we affirm the action of the trial court in dismissing the third-party complaint and reverse the action of the court below in dismissing the original complaint. This cause is remanded to the Circuit Court of Shelby County for a trial on the merits. Costs in this cause are taxed to original defendants, for which execution may issue, if necessary.

TOMLIN, J.

CRAWFORD, J.

HIGHERS, J.

IN THE COURT OF APPEALS OF TENNESSEE

WESTERN SECTION AT JACKSON

JACK TICKLE and RAY MONTEITH, Plaintiffs/ Appellees vs. SHELBY COUNTY; BOARD OF COUNTY COMMIS-SIONERS; COUNTY MAYOR WILLIAM MORRIS; SHELBY COUNTY BOARD OF PUBLIC UTILITIES; and WILBUR M. BETTY, Superintendent of Shelby County Board of Public Utilities, Defendants/ Appellants vs. THE CITY OF MILL-INGTON, TENNESSEE, Third-Party Defendant/ Appellee	)	SHELBY LAW NO. 38 Filed September 4, 1987

O R D E R

This matter came on to be regularly

heard and considered by the Court on the record, and for the reasons stated in the Opinion of the Court, filed this date, it is ordered that:

1. The judgment of the trial court is reversed.

2. Costs are adjudged against the plaintiffs-appellees for which execution may issue, if necessary.

ENTERED: September 4, 1987

HIGHERS, J.

TOMLIN, P.J., W.S.

FARMER, J.

IN THE COURT OF APPEALS OF TENNESSEE

WESTERN SECTION AT JACKSON

JACK TICKLE and RAY MONTEITH,	)	
Plaintiffs/ Appellees	)	
vs.	)	SHELBY LAW NO. 38
SHELBY COUNTY; BOARD OF COUNTY COMMISSIONERS; COUNTY MAYOR WILLIAM MORRIS; SHELBY COUNTY BOARD OF PUBLIC UTILITIES; and WILBUR M. BETTY, Superintendent of Shelby County Board of Public Utilities,	)	Filed September 4, 1987
Defendants/ Appellants	)	
vs.	)	
THE CITY OF MILLINGTON, TENNESSEE,	)	
Third-Party Defendant/ Appellee	)	

From the Circuit Court of Shelby County, Tennessee
The Honorable Robert A. Lanier, Judge

James D. Causey and Alice L. Gallaher

of Memphis
Attorneys for Plaintiffs/Appellees

Brian L. Kuhn
Shelby County Attorney
and
Britton Lamb
Assistant County Attorney

James W. Watson of Memphis
WATSON, ARNOULT & QUINN
Attorney for Third-Party
Defendant/Appellee

Opinion Filed: September 4, 1987

REVERSED

HIGHERS, J.

TOMLIN, P.J., W.S. (Concurs)

FARMER, J. (Concurs)

This appeal arises out of a suit filed in the Circuit Court of Shelby County in April, 1984 by the plaintiffs, Jack Tickle and Ray Monteith, against Shelby County, the Shelby County Board of County Commissioners, County Mayor William Morris, the Shelby County Public Utilities Board, and Wilbur M. Betty, Superintendent of the Public Utilities Board. The plaintiffs, developers

of a residential subdivision, sought money due under an "agreement" entered into in connection with the installation of water facilities in the subdivision.

The defendants filed a motion for summary judgment in February 1985. The trial judge granted the motion and dismissed the action; the plaintiffs appealed. Treating the motion as having been filed and considered under T.R.Civ.P. 12.02(6), this Court reversed the trial court's dismissal of the complaint, and remanded for trial.

On remand, the trial was held on October 7, 1986. On October 29, 1986, an order was entered awarding plaintiffs the sum of $104,208.99, plus prejudgment interest in the amount of $25,180.00; the action against Wilbur M. Betty was dismissed. The defendants have appealed the judgment against them.

The first issue on appeal is whether the decision of the trial court is supported by a preponderance of the evidence.

Plaintiffs were the developers of Woodmere Subdivision, located in northeast Shelby County near Millington, Tennessee. Plans called for the subdivision to be developed in three sections: first, Section A; second, Section C; third, Section B. Shelby County agreed to install the water facilities.

By letter dated February 24, 1978, R. E. Gallagher, then Superintendent of Public Utilities, provided the plaintiffs with an estimate of the cost of installing the water facilities. He stated that the cost would be "subject to our usual refund agreement." His letter is as follows:

> Dear Mr. Tickle:
>
> Based on current unit prices being offered this Board, the estimated cost of the water facilities to Woodmere Subdivision, First Section, is $45,870.00. Of this amount approximately $39,980.00 will be subject to our usual refund agree-

ment, a copy of which is enclosed for your information. The cost of fire protection, $5,890.00, is non-refundable.

The estimated cost of the complete Woodmere Subdivision is $155,457.00, which includes the amount given above for Section 1. Of this amount $132,225.00 is refundable, approximately, subject to our refund agreement. The cost of fire protection, $23,232.00, is non-refundable.

Should this estimate be acceptable to you, plans and specifications will be prepared and used to advertise for competitive bids for this installation. The successful bid prices, plus 10%, will be the cash deposit required before installation could begin. In addition, curbs and gutters, sewers and drainage pipes must be painted on the vertical face of the curb at the desired location on each lot where the water meter box should be located. Care should be taken so that this location is a minimum of four feet from the sewer ditch and will not be in a proposed driveway. In addition, lot lines must be marked for fire hydrant installations.

If you have any questions, please contact this office.

Very truly yours,

R. E. Gallagher

The "refund" is actually a type of re-

bate. The developer pays a certain sum of money to the Utilities Board (cost of installation plus ten percent), a portion of which is spent for fire hydrants and fittings. The rest is used to pay a contractor for actual installation of the water system. Subsequently, for ten years after completion ofthe system, the Utilities Board pays the developer a specific amount of money for each home in the subdivision that is connected to the water main. In no event, however, can the developer receive more than the amount actually paid to the Utilities Board, less the sum expended for fire protection.

In August 1978, Gallagher informed the plaintiffs, by letter, that a low bid for installing the water facilities in Section A of Woodmere had been received. In addition, Gallagher's letter provided that the plain-

tiffs, by accepting the bid and tendering a check, would waive any right to the usual refund agreement. The language in his letter specifically provided: "According to our understanding, upon acceptance of the above you waive any rights to our usual refund agreement. This will constitute a total charge to your company." The County maintains that the waiver was necessary because of a contract between Shelby County and the nearby City of Millington, which had plans for possible annexation of the subdivision. Plaintiffs made the payment, and the water facilities were installed.

In August of 1980, a low bid was received for the water system in section C of Woodmere. Again, acceptance of the bid was conditioned on waiver of the refund, stating: "In accordance with the previous agreement with the City of Millington, this water installation will not be subject to any

refund." Plaintiffs tendered a check, and installation began.

Bids for section B of Woodmere were received in May 1983. Although the cost was first stated to be non-refundable, the Utilities Board later entered into a refund agreement for that section only. Plaintiffs' position is that they also are entitled to a refund for sections A and C of Woodmere. Despite numerous inquiries, however, the County has refused the plaintiffs' demands.

Plaintiffs insist that they had a contract with the defendants, under the terms of which the Utilities Board would extend its usual refund agreement to the cost of providing water facilities for Woodmere. Their contention is that the letter of February 24, 1978, constituted an offer which they accepted. The evidence proves otherwise.

The February letter provided only that if the cost estimate was acceptable to the plaintiffs, the Utilities Board would pre-

pare plans and specifications that would be used to advertise for competitive bids. At that point, there were no mutual obligations; either party could have backed out of the arrangement without penalty. There were, however, three binding contracts entered into between the plaintiffs and the Utilities Board; one for each section of Woodmere. The offers were made when Gallagher communicated the amount of the low bid, and requested a check from the plaintiffs. Plaintiffs accepted the offers by tendering payment.

Plaintiffs further maintain that the defendants are estopped from denying them a refund for sections A and C of the subdivision.

In order for there to be an estoppel, it is necessary that the person estopped make a representation upon which another relies in acting to his prejudice. See Huffine v. Riadon, 541 S.W.2d 414 (Tenn. 1976);

Mitchell Engineering Co. Div. of CECO v. Melton, 478 S.W.2d 888 (Tenn. 1972); Bokor v. Holder, 722 S.W.2d 676 (Tenn. App. 1986); Duke v. Hopper, 486 S.W.2d 744 (Tenn. App. 1972).

In the case before us, Gallagher's letter of February 24, 1978, states that the cost of the water facilities is refundable. Wilbur Betty, the present Superintendent of Public Utilities, stated at trial that refund agreements were normally entered into with each developer. Plaintiffs assert that they acted to their prejudice in reliance on both the letter, and the usual policy of granting refunds.

The plaintiffs were initially informed that a refund for sections A and C of Woodmere Subdivision would be forthcoming. The contracts that were subsequently entered into, however, were conditioned expressly on the plaintiffs' waiver of the right to any refund agreements. After such a voluntary

waiver, plaintiffs clearly could no longer rely upon the previous representation to the contrary. Subsequent to the execution of the contracts, the record reveals no representations of any kind upon which the plaintiffs could rely. Therefore, there is nothing upon which to base an estoppel.

We hold that the decision of the trial court is contrary to the preponderance of the evidence. The other issues raised by the parties are thus pretermitted.

The judgment of the trial court is reversed. Costs of the appeal are adjudged against the plaintiffs-appellees.

HIGHERS, J.

TOMLIN, P.J., W.S.

FARMER, J.

AMENDMENT 14

§1. Citizenship - Due process of law - Equal protection. - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

TENNESSEE CODE ANNOTATED
§§5-16-110 and 5-16-111
(Original Text)

5-16-110. Annexation of facilities by municipality - Arbitration - Rights of bondholders. - (a) Upon annexation by any municipality of an area including any of the facilities herein authorized and provided for, the municipality and the county legislative body or other governing body shall attempt to reach agreement in writing for the allocation and conveyance to the municipality of any or all functions, rights, duties, property, assets or liabilities in conjunction with such facilities that justice and reason may require in the circumstances. The annexing municipality, for and to the extent that it may choose, shall have the exclusive right to provide such facilities within the annexed area. Subject to such exclusive right, any such matters upon which the respective parties are not in agreement in

writing within sixty (60) days after the operative date of such annexation shall be settled by arbitration in accordance with the laws of arbitration of the state of Tennessee effective at the time of submission to the arbitrators, and subdivision (2) of §23-501, shall not apply to any arbitration arising hereunder. The award so rendered shall be transmitted to the chancery court, and thereupon shall be subject to review in accordance with §§23-513 through 23-515 and §23-518.

(b) If there are outstanding bonds or other obligations in conjunction with the public facilities herein provided for, the agreement or arbitration award shall also provide that the municipality will operate such facilities in the annexed territory and account for the revenues therefrom in such manner as not to impair the obligations of contract with reference to such bonds or other obligations. The rights vested in the

holders of all such outstanding bonds or other obligtions shall be fully preserved and in no wise impaired by any agreement or arbitration award.

5-16-111. Limitation on service near city or town. - Effect of failure of municipality to provide facilities. - A county may not extend any public facilities, as provided for in this chapter, within five (5) miles of any part of the boundary of an incorporated city of town unless such incorporated city or town has failed to take appropriate action to provide a specified public facility or facilities in a specified area or areas for a period of ninety (90) days after having been petitioned to do so by resolution of the county legislative body or other governing body, which resolution shall contain a plan of service, and shall be accompanied by a preliminary engineering report and a financial feasibility

report, and shall set out the type, standard and schedule of installation of public facilities and the specified area or areas proposed to be served by the county, and which resolution, plan of service and reports shall have been previously submitted to the local planning commission for review as provided for in §5-16-112.

TENNESSEE CODE ANNOTATED
§§5-16-110 and 5-16-111
(Amended Text)

5-16-110. Municipal annexation or incorporation - Effect on facilities. - (a)(1) Upon annexation by any municipality, or by including within the corporate territorial limits of any incorporating municipality, of an area including any of the facilities herein authorized and provided for, the municipality and the county legislative body or other governing body shall attempt to reach agreement in writing for the allocation and conveyance to the municipality of any or all functions, rights, duties, property, assets or liabilities in conjunction with such facilities that justice and reason may require in the circumstances.

(2) The annexing or incorporating municipality, for and to the extent that it may choose, shall have the exclusive

right to provide such facilities within the annexed or incorporated area, and shall manifest such choice by proper resolution or ordinance at the first meeting of its governing body after the annexation or incorporation.

(3) Subject to such exclusive right, any such matters upon which the respective parties are not in agreement in writing within sixty (60) days after the operative date of such annexation shall be settled by arbitration in accordance with the state laws of arbitration effective at the time of submission to the arbitrators, and §29-5-101(2) shall not apply to any arbitration arising hereunder.

(4) The award so rendered shall be transmitted to the chancery court, and thereupon shall be subject to review in accordance with §§29-5-113 - 29-5-115 and 29-5-118.

(5) Subsections (a)(1) and (a)(2) shall not apply to any city which is being incorporated that does not plan to furnish competing service to that which the county is now furnishing.

(b)(1) If there are outstanding bonds or other obligations in conjunction with the public facilities herein provided for, the agreement or arbitration award shall also provide that the municipality will operate such facilities in the annexed or incorporated territory and account for the revenues therefrom in such manner as not to impair the obligations of contract with reference to such bonds or other obligations.

(2) The rights vested in the holders of all such outstanding bonds or other obligations shall be fully preserved and in no wise impaired by any

agreement or arbitration award.

5-6-111. Service near city or town - Restrictions. - A county may not extend any public facilities, as provided for in this chapter, within five (5) miles of any part of the boundary of an incorporated city or town unless such incorporated city or town has failed to take appropriate action to provide a specified public facility or facilities in a specified area or areas for a period of ninety (90) days after having been petitioned to do so by resolution of the county legislative body or other governing body, which resolution shall contain a plan of service, and shall be accompanied by a preliminary engineering report and a financial feasibility report, and shall set out the type, standard and schedule of installation

of public facilities and the specified area or areas proposed to be served by the county, and which resolution, plan of service and reports shall have been previously submitted to the local planning commission for review as provided for in §5-16-112.

CERTIFICATE OF SERVICE

I, James D. Causey, Counsel of Record for Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 22 day of February, 1988, I served three copies of the Appendix to Petition for Writ of Certiorari on each of the several parties thereto, as follows:

On Mr. Britton Lamb, Assistant County Attorney, by mailing three copies in a duly addressed envelope, with first-class postage prepaid to: Suite 801 - 160 North Mid-America Mall, Memphis, Tennessee 38103.

It is further certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

James D. Causey

NO. 87-1418

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1987

JACK TICKLE AND RAY MONTEITH,

PETITIONERS

v.

SHELBY COUNTY, et al,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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OPINIONS BELOW

In the Appendix to its Petition, Petitioner sets out two Opinions and Orders of the Court of Appeals of Tennessee and a per curiam Order of the Supreme Court of Tennessee, which the Respondent adopts by this reference.

STATEMENT OF THE CASE

The Petitioner's Statement of the Case is riddled with inaccuracy.

The true facts of the case, it is respectfully submitted, are thoroughly investigated and set out in the Opinion of the Court of Appeals filed September 4, 1987, to be found in the Petitioner's Appendix, Pages 16 et seq.

ARGUMENT

In its first Opinion, the Tennessee Court of Appeals finds that Plaintiff's Complaint was sufficient to entitle it to a

trial on the merits; in its second, the same Court finds that the pertinent allegations of the Complaint were not adequately sustained by the evidence.

The question concerning a violation of the Fourteenth Amendment was scarcely mentioned in any Tennessee Court so these Courts did not pass upon the matter.

No Federal question is involved in this case.

No Federal money is in any way involved.

CONCLUSION

For the reasons set forth above, the Respondents herein submit that a writ of certiorari should not be granted in this case.

Respectfully Submitted,

James B. Lamb

JAMES BRITTON LAMB,
Attorney for Respondents

CERTIFICATE OF SERVICE

I, James Britton Lamb, Counsel of Record for Respondents and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 15 day of March, 1988, I served three (3) copies of the foregoing Brief on Mr. James D. Causey, Attorney at Law, 208 Adams Avenue, Memphis, Tennessee, 38103.

It is further certified that all parties required to be served have been served.

James B. Lamb

JAMES BRITTON LAMB
Attorney for Respondents